TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~268.~~ 77

JAMES MADISON DOWNEY, PLAINTIFF IN ERROR,

vs.

WILLIAM D. NUTT.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 9, 1869.

SUPREME COURT OF THE UNITED STATES.

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INDEX.

	Original.	Print.
Petition to supreme court of appeals	1	1
Petition to district court of appeals	7	2
Declaration	10	3
Judgment of district court of appeals	17	7
Judgment of supreme court of appeals	19	7
Judgment on petition for supersedeas	22	8
Allowance of writ of error	23	8
Petition	24	8
Writ of error	28	9
Bond	31	10
Citation	33	11

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Petition	24	8
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1 Supreme court of appeals of Virginia, Richmond.

DOWNEY
vs.
NUTT.

To the Honorable Alexander Rives, a judge of the supreme court of appeals of the State of Virginia:

Your petitioner, James Madison Downey, respectfully represents that he is aggrieved by a final judgment of the district court of appeals for the fourth judicial district of Virginia, sitting at the court-house in the town of Fredericksburg, rendered at its July term, 1868, in a suit on the common-law side of said court, wherein your petitioner was
2 plaintiff, and [and] William D. Nutt was defendant, a certified copy of which judgment and proceedings of said court, together with a certified transcript of the record of this suit, begun and determined in the circuit court of the 9th judicial circuit, sitting in the county of Alexandria, is herewith presented.

Your petitioner represents that the judgment of the court is erroneous and not warranted by the facts, as found by the special verdict out of which this litigation has grown.

The record shows that on the 29th day of February, 1864, your petitioner purchased at a public sale, made by United States tax com-
3 missioners under the act of Congress of 1862, and amendments thereto, in relation to the collection of taxes in insurrectionary districts, the real estate thereon mentioned, for the sum of ($2,400) two thousand four hundred dollars; that upon the payment of the purchase-money to the said commissioners, they signed and delivered to him a certificate of said sale, evidencing his said purchase, as in such case provided by the said act and amendments thereto.

Your petitioner shows that the said certificate by the act and amendments aforesaid is prima-facie evidence of the regularity and
4 validity of said sale, which shall only be effected by establishing the following fact or facts, to wit:

That the property so held was not subject to taxation; or that it had been redeemed; or that the taxes thereon assessed had been paid previous to the sale thereof, in accordance with the direction of the said act and amendments thereto.

It is not pretended in this case that the property had been redeemed, or that the property was not liable to taxation, or that the tax thereon assessed had been paid in the manner provided by the law. The certificate aforesaid, therefore, concludes the defendant in this case
5 from any other enquiries, and is the muniment of a complete, perfect, and absolute title to the property in your petitioner.

For these and other grounds of error, your petitioner prays a writ of error and supersedeas to said judgment.

Respectfully submitted: THE PETITIONER,
By his Counsel.

I, Wm. B. Downey, an attorney practicing in the supreme court of appeals in Virginia, am of opinion that the judgment complained of in the foregoing petition is erroneous and ought to be reviewed and reversed.

WM. B. DOWNEY.

SEPTEMBER 12*th*, 1868.

6 Supersedeas awarded. Bond in the penalty of $200.

ALEX. RIVES.

To the CLERK *of Supreme Court of Appeals.*

REC. 268—1

7 District court of appeals.

J. MADISON DOWNEY }
vs.
WM. D. M'NUTT. }

To the Honorable R. C. L. Moncure, judge of the district court of appeals for the fourth district of Virginia:

Your petitioner, James Madison Downey, respectfully represents that he feels aggrieved by a final judgment of the circuit court of the 9th judicial circuit, sitting in the county of Alexandria, rendered at the November term, 1867, in a suit on the common-law side of said court, wherein Wm. D. Nutt was plaintiff, and your petitioner was defendant; a certified copy of the record in said suit is herewith presented.

The facts out of which this litigation has grown are fully set forth in the special verdict.

Your petitioner assigns the following errors in the final judgment of the said court, which is not warranted by the facts found in the special verdict.

The record shows that on the 29th day of February, 1864, your petitioner purchased at a public sale, made by United States tax commissioners, the real estate therein mentioned for the sum of ($2,400) twenty-four hundred dollars; that upon the payment of the purchase-money, the said commissioners delivered to your petitioner a certificate of said sale, evidencing his said purchase, as directed by the act of Congress and amendments thereto, in such case made and provided, and therefore the said real estate was delivered to your petitioner, and has ever since been held by him, without any adverse claim until the institution of this suit.

Your petitioner further shows that the certificate by the act
8 and amendments aforesaid, is prima-facie evidence of the regularity and validity of said sale, which shall *only* be effected by establishing the following fact or facts, to wit: That the property so held was not subject to taxation, or that the property had been redeemed, or that the taxes had been paid previous to the sale thereof, in accordance with the direction of the said act and amendments thereto. In this case it is not pretended that the property was not liable to taxation, or that the tax had been paid, or that it had been redeemed in the manner provided in the law. The certificate of the tax commissioners therefore, in this case, concludes the plaintiff from any other enquiries, and is the muniment of a complete, perfect, and absolute title to the property in your petitioner, the purchaser. As to the power Congress possesses to declare what effect such a certificate of title should have, your honor is referred to "Blackwell on Tax Titles," page 79s to conclusion of Chapter III, and the cases therein referred to.

For these and divers other grounds of error, your petitioner prays a writ of error and supersedeas to said judgment.

The petitioner, by WM. B. DOWNEY, *His Counsel.*

I, W. Willoughby, an attorney practicing in the district court of appeals in Virginia, am of opinion that the judgment complained of in the foregoing petition is erroneous and ought to be reviewed.

Respectfully submitted: W. WILLOUGHBY.

Supersedeas awarded. Bond with surety to be given in the penalty of one hundred and fifty dollars, conditioned as the law directs.

R. C. L. MONCURE.

FEBRUARY 15*th*, 1868.

To the CLERK *of the District Court held at Fredericksburg.*

9 ALEXANDRIA COUNTY, *Circuit Court:*

Bond has been given by the said J. Madison Downey with security sufficient as required by the above award.

Given under my hand this 17th day of March, 1868.

J. TACEY, *Clerk, &c.*

10 *Pleas.*

VIRGINIA:

Pleas at the court-house in the city of Alexandria, before the judge of the circuit court for Alexandria County, on the 23d day of November, 1867.

Title.

Be it remembered that heretofore, to wit, at the March rules, 1867, came William D. Nutt, by his attorney, and filed his declaration against Matthias Fletcher, of a plea of ejectment; which declaration, together with the notice, note, and the return of the sheriff thereon endorsed, is in the words and figures following:

Declaration.

STATE OF VIRGINIA, *Alexandria County, to wit:*

William D. Nutt, plaintiff, complains of Matthias Fletcher, defendant, for this, that heretofore, to wit, on the 1st day of January, 1864, the said William D. Nutt was possessed in fee of a certain tract of land lying in the said county of Alexandria, containing one hundred and eighty acres, called and known as 'Parm-Will-Alice,' binding on the line dividing the counties of Alexandria and Fairfax, and through which the Alexandria, Loudoun, and Hampshire railroad, and the Four-mile Run pass, the said tract of land being near Falls Church, and adjoins the lands of Henry Febrey and others.

And being so possessed thereof, that the said defendant afterwards, to wit, on the 1st day of February, 1865, at the county aforesaid, entered into the said premises, and that he, the said defendant, unlawfully withholds from the [the] said plaintiff possession thereof, to the damage of the said plaintiff $5,000; and therefore he brings suit.

FRANCIS L. SMITH, *P. Q.*

[Revenue stamp, 50 cts.]

11 *Notice.*

To Matthias Fletcher:

You will take notice that on the 1st Monday (the 4th day) of March, 1867, I shall file in the clerk's office of the circuit court of Alexandria County, Virginia, the foregoing declaration.

WILLIAM D. NUTT,
By FRANCIS L. SMITH, *his Attorney.*

Pl'tiff's claim.

In this case the plaintiff will demand of the defendant damages in the sum of $5,000, for the rents and profits of the said premises, and for withholding possession of the said land, to the amount of $5,000.

Sheriff's return.

Executed as to Matthias Fletcher, who was not found at his usual place of abode, by delivering at said place of abode, to his son, a white

person over the age of sixteen years, and who resides with the said Matthias Fletcher, a copy of this declaration, and by giving to him information of its purports.

February 14th, 1867. J. M. STEWART, *Sheriff.*

And a day is thereupon given the said defendant until the next rules to plead to the said plaintiff's declaration.

The following is a copy of the rule to plead, together with the sheriff's return thereon endorsed:

Rule to plead.

The commonwealth of Virginia to the sheriff of Alexandria County, greeting:

We command you to summon Matthias Fletcher, if he be found within your bailiwick, to appear at the clerk's office of our circuit court for our said county of Alexandria, at the rules to be holden for said court on the first Monday in April next, and plead to a declaration in ejectment filed in said office at the March rules, 1867, of said court, with
12 proof of the service of the notice thereof by William D. Nutt, and have then there this writ. Witness Jefferson Tacey, clerk of our said circuit court, at the court-house of said county, the 8th day of March, 1867, and in the 91st year of the commonwealth.

"J. TACEY, *Clerk.*"

Sheriff's return.

Sheriff's return: Executed by delivering a copy of this summons to Matthias Fletcher.

March 11th, 1867. J. M. STEWART, *Sheriff.*

And it appearing by the return of the said sheriff, made and endorsed upon the said declaration, that the said Matthias Fletcher, who was then in possession of the said premises, hath been duly served with a copy of said declaration, notice, and statement of claim for rents and profits, and he not appearing in obedience to said notice, it is ordered that unless he do appear here at the next rules and plead the general issue in the declaration supposed, judgment by default will be given for the plaintiff and a writ of possession awarded him.

Judgment by default.

And at another day, to wit, at rules held in the clerk's office of the said circuit court, on the first Monday in April, 1867, came the plaintiff, by his attorney, and the said Matthias Fletcher having been duly served with a copy of the rule issued against him, requiring him to appear at the then next rules, and plead to the plaintiff's declaration, and he not appearing, although solemnly called, it is considered that the plaintiff recover against the defendant the premises in the declaration mentioned, and the rents and profits claimed as aforesaid.

J. M. Downey admitted as defendant.

And at another day, to wit, at a circuit court continued and held for the said county of Alexandria, at the court-house of said county, on the 24th day of May, 1867, came the plaintiff by his attorney, and J. M.

Downey, on his motion, is admitted defendant in th
13 room of the said Matthias Fletcher, and thereupon, by
pleaded not guilty, and thereof put himself upon
and the plaintiff does the like, and this cause is continued

Continuance.

And at another day, to wit, at a circuit court continued
the county aforesaid, at the court-house aforesaid, on th
August, 1867, this cause is continued till the next term of t

Agreed case.

And now at this day, to wit, at a circuit court continued and held for the said county of Alexandria, at the court-house aforesaid, on the 23d day of November, 1867, came the parties by their attorneys, and a case was agreed by them to be argued in lieu of a special verdict; which case is in the words and figures following, to wit:

WILLIAM D. NUTT
vs.
J. M. DOWNEY. } In ejectment.

The following state of facts are agreed on between the plaintiff and the defendant, and, waiving a jury, further agree that this suit may be decided by the court, and a judgment rendered according to such decision; that the plaintiff, William D. Nutt, was, until the first of September, 1861, and by his agents, until the tax sale hereinafter mentioned, seized in fee of the tract of land in the declaration mentioned, containing one hundred and eighty acres, known as "Pam-Will-Allice;" that under and by virtue of the act of Congress, approved August 5th, 1861, entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes," and the act of Congress, approved June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and the acts amendatory thereto, on the day of March, 1863, John Hawxhurst, Gillet F. Watson, and Wm. J. Bowman
were appointed a board of tax commissioners for the State of
14 Virginia, and that they were each duly commissioned and qualified, having given the security required by said laws. That the said commissioners, upon the 14th day of September, 1863, entered upon the discharge of their duties, and opened an office for the transaction of business in the city of Alexandria, and that subsequently the said Wm. J. Bowman resigned his said office, and thereupon A. Lawrence Foster was appointed to fill the vacancy, and was in like manner commissioned and qualified, and gave security as required by law, and entered upon the discharge of his duties as tax commissioner. That the said board subsequently fixed the amount of tax charged upon said land, under the said acts of Congress, at seventeen dollars and one cent; penalty, eight dollars and fifty-one cents, and fifteen per cent. damages. That the taxes charged upon said land were not paid within sixty days from the time the amount of said tax was fixed, by the commissioners, as provided for in the 3d section of said act of Congress of June 7th, 1862, and that the said board of commissioners thereupon caused the said land to be duly advertised to be sold at Alexandria, Virginia, on the 29th day of February, 1864. That pursuant to said notice the said board of tax commissioners caused the said land to be sold in accordance with

person over the age of sixteen years, and who resides with the said Matthias Fletcher, a copy of this declaration, and by giving to him information of its purports.

February 14th, 1867. J. M. STEWART, *Sheriff.*

And a day is thereupon given the said defendant until the next rules to plead to the said plaintiff's declaration.

The following is a copy of the rule to plead, together with the sheriff's return thereon endorsed:

Rule to plead.

The commonwealth of Virginia to the sheriff of Alexandria County, greeting:

We command you to summon Matthias Fletcher, if he be found within your bailiwick, to appear at the clerk's office of our circuit court for our said county of Alexandria, at the rules to be holden for said court on the first Monday in April next, and plead to a declaration in ejectment filed in said office at the March rules, 1867, of said court, with
12 proof of the service of the notice thereof by William D. Nutt, and have then there this writ. Witness Jefferson Tacey, clerk of our said circuit court, at the court-house of said county, the 8th day of March, 1867, and in the 91st year of the commonwealth.

"J. TACEY, *Clerk.*"

Sheriff's return.

Sheriff's return: Executed by delivering a copy of this summons to Matthias Fletcher.

March 11th, 1867. J. M. STEWART, *Sheriff.*

And it appearing by the return of the said sheriff, made and endorsed upon the said declaration, that the said Matthias Fletcher, who was then in possession of the said premises, hath been duly served with a copy of said declaration, notice, and statement of claim for rents and profits, and he not appearing in obedience to said notice, it is ordered that unless he do appear here at the next rules and plead the general issue in the declaration supposed, judgment by default will be given for the plaintiff and a writ of possession awarded him.

Judgment by default.

And at another day, to wit, at rules held in the clerk's office of the said circuit court, on the first Monday in April, 1867, came the plaintiff, by his attorney, and the said Matthias Fletcher having been duly served with a copy of the rule issued against him, requiring him to appear at the then next rules, and plead to the plaintiff's declaration, and he not appearing, although solemnly called, it is considered that the plaintiff recover against the defendant the premises in the declaration mentioned, and the rents and profits claimed as aforesaid.

J. M. Downey admitted as defendant.

And at another day, to wit, at a circuit court continued and held for the said county of Alexandria, at the court-house of said county, on the 24th day of May, 1867, came the plaintiff by his attorney, and J. M.

Downey, on his motion, is admitted defendant in this suit, in the
13 room of the said Matthias Fletcher, and thereupon, by his attorney, pleaded not guilty, and thereof put himself upon the country, and the plaintiff does the like, and this cause is continued.

Continuance.

And at another day, to wit, at a circuit court continued and held for the county aforesaid, at the court-house aforesaid, on the 23d day of August, 1867, this cause is continued till the next term of this court.

Agreed case.

And now at this day, to wit, at a circuit court continued and held for the said county of Alexandria, at the court-house aforesaid, on the 23d day of November, 1867, came the parties by their attorneys, and a case was agreed by them to be argued in lieu of a special verdict; which case is in the words and figures following, to wit:

WILLIAM D. NUTT
vs.
J. M. DOWNEY. } In ejectment.

The following state of facts are agreed on between the plaintiff and the defendant, and, waiving a jury, further agree that this suit may be decided by the court, and a judgment rendered according to such decision; that the plaintiff, William D. Nutt, was, until the first of September, 1861, and by his agents, until the tax sale hereinafter mentioned, seized in fee of the tract of land in the declaration mentioned, containing one hundred and eighty acres, known as "Pam-Will-Allice;" that under and by virtue of the act of Congress, approved August 5th, 1861, entitled "An act to provide increased revenue from imports, to pay interest on the public debt, and for other purposes," and the act of Congress, approved June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," and the acts amendatory thereto, on the day of March, 1863, John Hawxhurst, Gillet F. Watson, and Wm. J. Bowman were appointed a board of tax commissioners for the State of
14 Virginia, and that they were each duly commissioned and qualified, having given the security required by said laws. That the said commissioners, upon the 14th day of September, 1863, entered upon the discharge of their duties, and opened an office for the transaction of business in the city of Alexandria, and that subsequently the said Wm. J. Bowman resigned his said office, and thereupon A. Lawrence Foster was appointed to fill the vacancy, and was in like manner commissioned and qualified, and gave security as required by law, and entered upon the discharge of his duties as tax commissioner. That the said board subsequently fixed the amount of tax charged upon said land, under the said acts of Congress, at seventeen dollars and one cent; penalty, eight dollars and fifty-one cents, and fifteen per cent. damages. That the taxes charged upon said land were not paid within sixty days from the time the amount of said tax was fixed, by the commissioners, as provided for in the 3d section of said act of Congress of June 7th, 1862, and that the said board of commissioners thereupon caused the said land to be duly advertised to be sold at Alexandria, Virginia, on the 29th day of February, 1864. That pursuant to said notice the said board of tax commissioners caused the said land to be sold in accordance with

the provisions of said acts of Congress to F. H. Pierpoint, as the highest bidder, at the sum of twenty-four hundred dollars. That the said sale was made without the knowledge or consent of the said William D. Nutt, the plaintiff. That the said F. H. Pierpoint transferred the said purchase to the defendant, J. M. Downey, to whom the said commissioners issued a certificate in the words and figures following, to wit:

No. 297.

United States of America.—Tax sale certificate, No. 93.

This is to certify that at a sale of lands for unpaid taxes, under and by virtue of an act entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," held, pursuant to notice, at Alexandria, in the county of
15 Alexandria, in the State of Virginia, on the 29th day of February, A. D. 1864, the tract or parcel of land hereinafter described, situate in the county of Alexandria, and [and] State aforesaid, and described as follows, to wit: One hundred and eighty acres (*Palmer* Will*is* Alice), near Falls Church, northwest of court-house eight miles, said to have belonged to Wm. D. Nutt, and charged to him on the land-book of the State aforesaid, for the year 1860, and valued on said book at six thousand three hundred dollars, was sold and struck off to F. H. Pierpoint (J. M. Downey), for the sum of twenty-four hundred dollars and ——— cents, he being the highest bidder, and that being the highest sum bidden for the same, the receipt of which said sum in full is hereby acknowledged and confessed. Given under our hands at Alexandria, this 29th day of February, A. D. 1864.

JOHN HAWXHURST.
GILLET F. WATSON.
A. LAWRENCE FOSTER.

It is further agreed that the said tract of land so sold is the same sued for in this action; that it is valued on the land commissioners' books for the county of Alexandria, and State of Virginia, for the year 1860, at the sum of $6,300, at the time of said sale, and is now worth twenty dollars per acre, is susceptible of easy division into smaller tracts, and contains one hundred and eighty acres; that the said plaintiff has not conveyed away or parted with said tract of land or any part thereof, or his title thereto in anywise lienned or affected, unless by and under said tax sale above mentioned.

November 21st, 1867.

FRANCIS L. SMITH,
Attorney for Plaintiff.
WM. B. DOWNEY,
Attorney for Defendant.

Judgment.

And thereupon, the matters of law arising upon the case agreed in this cause being argued, it seems to the court that the law is for the plaintiff. Therefore it is considered by the court that the plaint-
16 iff recover against the defendant the possession of the premises, according to the description thereof in the declaration, and the costs by him about his suit in this behalf expended.

Hab. fa. poss. awarded.

And on motion of the said plaintiff a writ of possession is awarded him, to the sheriff directed, to cause him to have his possession of the said premises.

Judgm't suspended for 90 days.

And on motion of the said defendant, the execution of the judgment in this cause is stayed for ninety days, to enable him to apply for a supersedeas.

Judgm't suspen'd for additional 30 days.

And at another day, to wit, at a circuit court continued and held for the county of Alexandria, and at the court-house of said county, on the 4th day of February, 1868, on the motion of the defendant, by his attorney, for reasons appearing to the court, it doth order that the execution of the judgment obtained in this cause at the November term, 1867, be further suspended for thirty days from and after the expiration of the suspension of ninety days ordered on the 23d day of November, 1867.

Plaintiff's costs, $13 17. Defendant's costs, $1 98.

From the record, a true copy.

Teste: J. TACEY, *Clerk.*

17 VIRGINIA:

At a district court held for the fourth judicial district, at the court-house in the town of Fredericksburg, on Tuesday, July the 14th, 1868.

JAMES MADISON DOWNEY, PLAINTIFF,
against
WILLIAM D. NUTT, DEFENDANT.

Upon a writ of supersedeas to a judgment of the circuit court of Alexandria County, recovered by the defendant against the plaintiff on the 23d day of November, 1867.

18 This day came the parties by their counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid, and the arguments of counsel, is of opinion that there is no error in the said judgment. Therefore it is considered that the same be affirmed, and the plaintiff pay to the defendant his costs by him about his defence in this behalf expended, and also one dollar damages.

Which is ordered to be certified to the said circuit court.

Defendant's costs, $33 17.

A copy. Teste: J. J. CHEW, *C. C.*

19 VIRGINIA:

At a supreme court of appeals held at the capitol in the city of Richmond, on Saturday, February 13th, 1869.

JAMES M. DOWNEY, PLAINTIFF,
against
WILLIAM D. NUTT, DEFENDANT.

Upon a writ of supersedeas to a judgment rendered by the district court held for the fourth judicial district, at the court-house in the town of Fredericksburg, on the fourteenth day of July, 1868, affirming with costs &c., a judgment rendered by the circuit court of Alexan-
20 dria County, on the twenty-third day of November, 1867, in a suit in which the defendant was plaintiff, and the plaintiff was defendant.

This day came the parties, by their counsel, and the court, having maturely considered the transcript of the record of the judgments aforesaid and the arguments of counsel, is of the opinion that, for reasons stated in the cases of Martin against Snowden, trustee, Bennett against Hunter and partner, and Recha against Cazenove, eighteenth
21 Gratton, page one hundred; and Turner against Smith, &c., Id., page eight hundred and thirty, which rule this case, there is no error in the judgment of the said district court; therefore it is considered that the same be affirmed, and that the defendant recover against the plaintiff thirty dollars damages, and also his costs by him about his defence in this behalf expended.

Which is ordered to be certified to the said district court, the clerk of which is ordered to certify the same to the said circuit court forthwith.

22 VIRGINIA:

At a supreme court of appeals, held at the capitol in the city of Richmond, on Wednesday, Feb'y 17th, 1869.

JAMES M. DOWNEY, PLAINTIFF,
against
WILLIAM D. NUTT, DEFENDANT.

Upon a writ of supersedeas to a judgment of the district court, held at Fredericksburg.

On motion of the plaintiff, by his counsel, it is ordered that the judgment entered in this cause on Saturday last be forthwith certified to the said district court.

Defendant's costs in court of appeals, $23 62.

Teste: M. T. STARKE, *C. C.*

23 WASH'GT'N, *Feb.* 24, 1869.

Writ of error allowed on within judgment, returnable to next term of Supreme Court of U. States.

S. P. CHASE,
Chief Justice U. States.

24 Hon. Salmon P. Chase, Chief Justice of the Supreme Court of United States:

The petiton of James M. Downey respectfully represents that a certain judgment was rendered against your petitioner at the suit of Wm. D. Nutt, at a circuit court for the county of Alexandria, in the State of Virgin, held on the 23d day of November, in the year 1867, in which suit your petitioner set up & claimed a right, title, privilege, & exemption, under certain statutes of the United States, & in which was drawn in question the construction of the Constitution of the United States, & of certain clauses of said statutes of the United States, & in which suit the decision & judgment was against the right, title, privilege, & exemption so claimed as aforesaid; which said judgment was afterwards, in all things, affirmed by a final judgment of the supreme court of appeals of the commonwealth of Virginia, on the appeal
25 of your petitioner in that behalf, to wit, on the 17th day of Feb'y, 1869, as appears by the records; that in said suit, which was an action brought by said Wm. D. Nutt to recover from your petitioner the possession of certain real estate in said county of Alexandria, which said

Nutt claimed that your petitioner unlawfully withheld from him, your petitioner set up & claimed as his defense a right to such possession by virtue of a certificate of sale made to him, or to parties through whom he claimed, by the tax commissioners of the United States, under the act of Congress of June 7th, 1862, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, & for other purposes," and the amendments thereto.

The court held & adjudged that such certificate of sale was not such evidence of title as the act prescribes, & that your petitioner had no right to the possession of said premises by virtue of said certifi-
26 cate of sale, nor for any other reason; which said judgment was contrary to the provisions of the acts of Congress aforesaid.

Wherefore your petitioner prays your honor to allow a writ of error to the said supreme court of appeals of the State of Virginia, it being the highest court of law of the said State in which a decision of the said suit could be had, & in which final judgment was entered, as appears of record, for the correction of the errors aforesaid, & the reversal of the judgment aforesaid, according to the form of the statute in such case made & provided.

JAMES M. DOWNEY,
By W. WILLOUGHBY, *Att'y.*

27 (Indorsed:) J. M. Downey vs. Wm. D. Nutt. Petition for writ of error to sup. court of appeals.

A copy of the within petition was filed in my office on the 28th day of Feb'y, 1869.

M. T. STARKE,
Clerk of the Supreme Court of Appeals of Virginia.

(Indorsed in pencil:) Original to be sent to Sup. Court of U. S.

28 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the supreme court of appeals of the commonwealth of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals of the commonwealth of Virginia, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between James Madison Downey, appellant, and William D. Nutt, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision
29 was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said James Madison Downey, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in

this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and sixty-eight.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by

30 I certify that a copy of this writ was filed in my office the 28th day of Feb'y, 1869.

M. T. STARKE,
Clerk of the Supreme Court of Appeals of Va.

(Indorsed in pencil:) Original to be returned to Sup. Court.

31 Know all men by these presents, that we are held and firmly bound unto William D. Nutt in the full and just sum of two thousand dollars, to be paid to the said William D. Nutt, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas lately at a supreme court of appeals of the commonwealth of Virginia, in a suit depending in said court between James Madison Downey, appellant, and William D. Nutt, appellee, judgment was rendered against the said James Madison Downey, and the said James Madison Downey having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William D. Nutt, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said James Madison Downey shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. B. DOWNEY. [L. S.]
JOSIAH MILLARD. [L. S.]

Sealed and delivered in presence of—

Approved by—

S. P. CHASE,
Chief Justice U. States.

32 (Indorsed:) James M. Downey vs. Wm. D. Nutt. Bond for writ of error. Copy.

The original bond, of which this is a copy, was filed in my office on the 28th day of February, 1869.

M. T. STARKE,
Clerk of the Sup. Court of Appeals of Va.

(Indorsed in pencil:) To be sent to Sup. U. S. Court.

33 The United States of America to William D. Nutt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the commonwealth of Virginia, wherein James Madison Downey is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Signed, February 24, 1869.

S. P. CHASE,
Chief Justice of the U. States.

34 Due service of the within citation acknowledged this 25th day of Feb'y, 1869.

FRANCIS L. SMITH,
Attorney for Wm. D. Nutt.

A copy of this citation was filed in my office the 28th day of Feb'y, 1869.

M. T. STARKE,
Clerk of the Supreme Court of Appeals of Va.

(Indorsed in pencil:) Original to be sent to U. S. Sup. Court.

(Indorsement on record:) Virginia sup. c't of appeals. No. 268. James Madison Downey, plaintiff in error, vs. William D. Nutt.

Filed 9th October, 1869.

JAMES M. DOWNEY,

PLAINTIFF IN ERROR,

vs.

WILLIAM D. NUTT,

DEFENDANT IN ERROR.

SUPREME COURT

OF THE

UNITED STATES.

POINTS AND ARGUMENT FOR PLAINTIFF IN ERROR.

This case comes before the Court upon a writ of error directed to the Supreme Court of Appeals of Virginia.

The suit was originally brought in the Circuit Court of Alexandria county in ejectment to recover the possession of a farm of one hundred and eighty acres situated in the county.

The defence was founded upon a certificate of sale made by the United States tax commissioners appointed under the act of Congress of June 7th, 1862, entitled "An act to collect taxes in insurrectionary districts and for other purposes." Judgment was given for the plaintiff in the Circuit Court, the defendant in error here.

This judgment was affirmed by the Court of Appeals, and the writ of error issued on behalf of the defendant in the Circuit Court, who claims that the certificate of sale is valid, and that he has a right to hold possession under it.

The record shows the following facts:

The taxes against the land were properly assessed as directed by the act, and default having been made in the payment thereof the land was duly advertised for sale, and in pursuance thereof was sold, and a certificate of sale issued to the purchaser, the plaintiff in error, on the 29th day of February, 1864. This certificate of sale describes the land as having belonged to Wm. D. Nutt, and valued on the land book of the State for

the year 1860 at six thousand three hundred dollars, and as being sold for twenty-four hundred dollars, the highest sum bidden for the land, and is in the usual form, signed by the Commissioners.

The record also admits that the land is susceptible of easy division into smaller tracts, and is now worth twenty dollars per acre.

These are all the facts deemed material to the questions which it is supposed will be presented to this Court.

This cause has never been argued before any of the courts, and I do not know how the title of the plaintiff is to be assailed except upon perhaps one or more of the following grounds: First, that the law itself is unconstitutional; or, second, that the sale was void because the whole of the land was sold instead of only sufficient to pay the taxes and costs; or, third, that it was void because the certificate of sale shows that the land was sold for less than two-thirds of its assessed value, and that in such a case by the statute the Commissioners were required to have bid it in for the United States.

As to the constitutionality of the law, it may be said:

It seemed to be assumed by this Court in the case of Bennett *vs.* Hunter, 9th Wallace, in which case this point was argued at great length. Congress has power to "levy and collect" taxes and "to make all laws which shall be necessary and proper for carrying into execution" that power, and in that case this Court says, after speaking of the necessities of the war arising from the rebellion, "This act or some similar provision was necessary to enable the President to perform the duty devolved upon him by the act of 1861." In other words, it was a necessary and proper law. "The provisions of this act were *necessarily* adapted to the peculiar circumstances in which it was to be executed."

The constitutionality of such an act is affirmed in the strongest language in Wild's lessee *vs.* Serpell, 10 Gratten, Rep. 376.

Kinney *vs.* Beverly, 2 Henning and Mumford's Rep. 318.

4 Wheaton, Rep. 316, McCulloch *vs.* Maryland.

McCorrel *vs.* Weeks, 2 Overton, 215.

State *vs.* Allen, 2 McCord, 56.

Livingston *vs.* Moore, 7 Peters, 469.

See also other authorities cited in briefs of counsel for plaintiff in error in Bennett *vs.* Hunter.

In Cooley's Constitutional Limitations, 479, it is said, "The power to impose taxes is one so unlimited in force and searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It imposes a burden, which in case of failure to discharge it, may be followed by seizure, sale, and confiscation of property. No attri-

bute of sovereignty is more perverting, and at no point does the power of the Government affect more constantly and intimately all the relations of life than through this power."

It is contended, however, that though the act may in its general scope be constitutional, that if it is to be construed as authorizing a sale of the whole of the land when the sale of a part of it would be sufficient to pay the taxes, penalty, and costs, it would be to that extent unconstitutional. That the act is so to be construed, it seems to me there can be no doubt. Section 4 of the act prescribes that upon default in the payment of the taxes the title thereto shall become forfeited to the United States, and upon the sale provided for shall vest in the purchaser. The question in the case of Bennett *vs.* Hunter was whether this forfeiture became complete upon default of payment or upon sale, and this Court held that it did not become complete until the sale, which was regarded as like "office found," "intended to work the actual investment of the title through a public act of the Government." This decision of the Court seems to show that the forfeiture of the title was, at least at the sale, complete, and that this applied to the whole of the land.

The statute declares that this land, the same parcels of land, shall be advertised and sold to the highest bidder. (Sec. 7.) That the sale of the whole land was contemplated is shown by the fact that it declares that "The Commissioners shall be authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum."

In the act of March 3, 1865, it is provided that any loyal lien creditor may, after period of redemption has expired, be paid out of the balance of the proceeds of sale after the same shall be paid into the Treasury of the United States. This shows that a *balance*, after paying the taxes, &c., was expected to go into the Treasury.

It is argued that because a penalty of fifty per cent. is prescribed, and this is named as a penalty "*eo nomine*," that therefore we are to infer that no other penalty was intended.

Now, if the law simply stated that such penalty should be incurred, we might infer that no other penalty was intended; but it *does* say that the land shall be forfeited and sold. It does not, it is true, *call* it a penalty, but it is a penalty nevertheless, and is prescribed by the act.

When we consider under what circumstances the law was passed—that it was on account of the difficulty of collecting the tax, and because the former act was not stringent enough; that it was designed to operate in territories occupied by public enemies, who were in arms against this law, as well as all others, how absurd would it be to prescribe such a penalty alone as the addition of fifty per cent. to the tax; and if the lands

were to be sold it was simply to pay this additional penalty, the balance to be retained by the owner of the land. It was designed to *enforce the collection of the tax*, and if construed as contended for by the plaintiff would be entirely abortive for that purpose, and instead of being a measure of terror, as it was designed, would be a subject of laughter and contempt.

It is asked, if it was intended to take the land itself why was this penalty of fifty per cent. prescribed. It will be observed that if payment is made at any time within the sixty days only the tax is required. If payment is made afterward, and after the forfeiture, except by the owner, before sold, the penalty must be paid and interest.

This delay is of itself a good reason for the imposition of the penalty, and is sufficient to account for it. This delay might be made for a long time. In some cases of redemption it might be for two years after sale. It might be a long time before the commissioners could effect the sale. In the mean time the Government, being in the most pressing need of money, says if you do not pay promptly you shall pay fifty per cent. as a penalty for delay, and the payment of this penalty shall be one of the terms of redemption.

The object of the penalty is to punish the party to that extent, *even in cases where he redeems*, unless such redemption is by the *owner before sale* and to give the Government some compensation for delay, and to induce the party to pay before the expiration of the sixty days. It is true the declared purpose of the act is to collect the tax, but *as a means of collection, and coercion of such collection*, it did, as it was proper to do, declare and impose punishments for non-payment, and the forfeiture and sale of the land was one of the punishments declared, and the fifty per cent. penalty was the other. The party might save himself from the former and most severe one by suffering the latter and complying with the terms of redemption prescribed.

It is said by the counsel for appellees that no provision is made in the act for a disposition of the surplus money after paying the tax, penalty, and costs. Were this true it would show nothing more than an oversight *in regard to such disposition. That under any construction* of the law there would necessarily be such an overplus would be inevitable. This being so, either under the construction contended for by the appellees or appellants, no inference can be drawn from such an oversight or omission, if there were such an omission.

The very fact that in the act of August, 1861, imposing the tax, it expressly declares that only sufficient of the land to pay the taxes shall be sold, while in this act the language is that the property, the same property, shall be sold, is alone sufficient, according to the ordinary rules of construction, to show the intention to authorize the sale of the whole of the

property. Unless something more stringent than the law of 1861 was intended, why was this law enacted? It is true that it may be said that the object of the law is to raise revenue, and not to get the land. But, though this is the object, the declaration that the whole of the land shall be forfeited and sold is a means of accomplishing this object. It is a warning of what will be the consequences of default. It is not a mere idle threat, not intended to be enforced. The forfeiture and sale is the execution of the penalty of which the party had ample warning, and it cannot be expected that the Court will now refuse to sustain the action of the Government because it may work hardship to the defaulting owner.

This statute is not therefore to be construed as some have been in some of the States, where the statute itself expressly declares, as did the act of 1861, that only sufficient of the land shall be sold to pay the taxes, penalty, and costs.

It is impossible to see from this act how the Commissioners could have proceeded in this respect in any other way than to sell the whole of the land. No provision whatever is made for the sale of a part, and such a sale would clearly have been irregular. The statute *required* a sale of *more* than enough to pay the taxes, &c., in every case, otherwise the commissioners were required to bid it in for the Government. In this way *no money* would really have been raised.

But it is contended that Congress has not power to authorize a sale of the whole of the land when a part of it would be sufficient. This, however, is abundantly shown in the authorities heretofore cited, especially in Kinney *vs.* Beverly, 2 H. and M. Va. Rep., 318, and Wild's lessee *vs.* Serpell, 10 Grat. Rep., 376.

See also Clarke *vs.* Strickland, 2 Curtis, 439.
Hoydon *vs.* Wright, 36 Maine, 326.
Hill *vs.* Mason, 38 Maine, 461.
Loomis *vs.* Pingue, 43 Maine, 299.
Williamsbury *vs.* Lord, 51 Maine, 599.
Usher *vs.* Pride, 15 Grat., 190.
31 N. Y. Rep., 580.

and other cases cited by counsel for plaintiff in error in Bennett *vs.* Hunter.

The power of the Legislature of a State to direct the sale of the whole of the land was so conclusively established that the Court of Appeals of Virginia, in the case of Bennett *vs.* Hunter, see 18 Grattan Rep., admitted such power to exist in the State, but contended that it did not follow that such power existed in the Congress of the United States. The argument as stated is substantially this. Such forfeitures proceed upon the ground of a breach of the condition upon which the owner holds his land; that every owner holds his land upon the implied condition that he will

pay his taxes; that on failure to do so the paramount authority of the State *from whom the land is holden* comes in on the ground of a breach of this condition, and for this declares the estate forfeited; that such a principle to a State from whom the lands are holden, but not to the United States; that to claim any such power would be interfering with the sovereignty of a State; that the Government of the United States being only of limited powers has no powers except what is conferred upon it by the Constitution, while the powers of a State are limited only by the Constitution of the United States or of the State itself; that although the Constitution gives to Congress the power to levy and collect taxes, and to pass all laws necessary and proper to execute this power, yet that this was designed to give it only the usual and ordinary means to enforce such collection, and such means as might be appropriate, and that the power to forfeit and sell the whole of the land, when a part would be sufficient, was not such usual, or ordinary, or appropriate means, and was not so regarded by the States, even though the single State of Virginia may have adopted such means.

This argument starts out with an entire misapprehension of the origin and extent of the power of taxation. This power does not rest alone upon the clauses of the Constitution in relation to such power. It is a power essential to the existence of all government. As it is said in Cooley's Constitutional Limitations, page 479, "It rests upon *necessity* and *is inherent* in every sovereignty." The Legislature of every free State will possess it *under the general grant of legislative power*, whether particularly specified in the Constitution among the powers to be exercised by it or not. See also McCulloch *vs.* Maryland, 4 Wheaton Rep., 316.

It is a power which always has been, and must of necessity be exercised by every civilized government. It is implied in the very existence of any government or sovereignty, and no nation, State, or even municipal corporation can be found which does not possess this power.

It is a great mistake to say that the power of forfeiture arises from *eminent domain*. It cannot be said, particularly in Virginia, that the State is the owner of the ultimate property in lands, for the feudal tenure was expressly abolished by statute in 1779. Similar statutes were early enacted in nearly all the States. The cases above cited from the Virginia Reports, holding so explicitly the constitutional power of the Legislature to direct the forfeiture and sale of the whole land for the failure to pay taxes, could not have been decided upon such a principle.

Judge Tucker says, 1 Tucker's Blackstone, book 2, page 40: "By the act of 1779 abolishing English tenures, the possession of all lands in Virginia became allodial, that is, independent and held of no superior at all." In Kinney *vs.* Beverly, 2 H. and M. Rep., 333, it is held that there

can be no cause of forfeiture *because of any condition in the grant, and only in consequence of the positive provisions of some public statute.*

But there is a certain title which every State and the nation has in all lands within its territorial limits, and that is a title it holds by virtue of its *sovereignty*. And I think it is here that we may look for the source of the power to tax all property, and to enforce its collection if deemed necessary by forfeiture, confiscation, or any other means. What reason then can be given why for this purpose the sovereignty of the nation is not as pervading as that of the State?

The history of the Constitution shows that the grant of the power to levy and collect taxes was the subject of more discussion and hostility than any other. The opposition to it was placed upon the ground that the powers it conferred were "unconfined," "unlimited," "concurrent," and coequal with those of the States. Judge Mason, in the Virginia convention, declared that "being at discretion and unconfined, it must carry everything before it."

Mr. Madison said: "Where is the evil of its being a power of taxation *concurrent* with the States? Does the concurrent collection of taxes imposed by a State for general purposes, and levies made by counties for county purposes, produce any inconvenience? I concur in opinion with those gentlemen who hold that this power is essential to the salvation of the Union."

See 3 Elliott's Debates, 96, 256, 257, 248, 306, 329.

Federalist, Nos. 32, 36.

Suppose, however, it should be conceded for the sake of the argument, that Congress had no power to authorize the sale of the whole of the land, when a part would have sufficed, and that the act confers no such power. There would then be an entirely conclusive answer to the objection that the whole land was sold, and that is: The objection is one to the *regularity and validity of the sale, and this objection is precluded by the certificate of sale.* Both the 7th section of the act of 1862 and the amendment of 1863 provide that the certificate of the Tax Commissioners shall be received in all Courts as *prima facie* evidence of the "regularity and validity" of the sale, and that it shall only be affected as such evidence by establishing the fact that the property was not subject to the tax, or that the tax had been paid previous to the sale, or that the property had been redeemed according to the provisions of the act.

It has, however, been argued that this refers only to the mode and manner of conducting the sale, and to sustain this view reference is made to Garrett *vs.* Wiggins, 3 Scammon's Ill. Rep., 335, where, under a statute which made the certificate evidence of the regularity and legality of the sale, it was held that this related only to the mode and manner of the sale, and not to the authority to make the sale.

It would seem as though the framers of this act had this very decision in mind, and drew it for the purpose of avoiding the principle of that decision. It was there held that inquiry could be made into the *validity* of the sale, notwithstanding the provisions of this statute, and, therefore, in order to avoid this result, *this statute* instead of using the words "regularity and legality" of the sale, employs the terms "*regularity and validity.*" How can a sale be *valid*, and at the same time void? The distinction between regularity of the sale and its validity is recognized in many authorities.

See Gwynne *vs.* Missenger, 18 Ohio R., 88.

Rhinehart *vs.* Schuyler, 2 Gilman, 556.

Flanagan *vs.* Grimmett, 10 Grat., 435.

But it is argued this inquiry can be made, because it goes to the authority of the Commissioners. If that is the reason, why not make inquiry as to their authority in any other particular? Why not inquire whether the property was properly advertised or not, or why any other step to be taken before the sale was properly taken? All these steps should be taken to give the Commissioners *authority* to sell. Such reasoning would entirely break down the barrier which this proviso sets up for the defence of the purchaser. How could a sale be *valid* if the Commissioners had no authority to sell? The *sale* might be *regular* in form, and conducted in a legal manner, and yet be void for want of authority. But it could not be *valid* if such authority were wanting. The terms of the statute therefore exclude an inquiry into even the *authority* of the Commissioners except on the grounds enumerated.

But it is urged that such a provision so construed would be beyond the power of Congress.

Provisions of this character have, however, been sustained by the courts.

An act of the Virginia Legislature of February 9, 1814, directs the sheriff to execute a deed to the purchaser. Sec. 38 provides that after the time of redemption, the regularity of the proceedings under which the purchaser claims title shall not be questioned, unless it appears on the face of the proceedings.

This statute came before the Court in Hanagon *vs.* Grimmett, 10 Gratton, 421, and it was decided that the deed need not show all the steps to have been taken. The Court say, page 435, "The 38th section of the act of 1814 restricted the party to irregularities appearing on the face of the proceedings, not permitting the contesting party to look beyond the proceedings, and prove by evidence "aliunde," *though that might be the sheriff's receipt for taxes that the taxes had been regularly paid*, for it is expressly provided that after the expiration of the time for redemption the arrearage

of taxes, for the non-payment of which the land was sold, should not be denied. This is substantially the provision of the statute of Virginia to this day. See code of 1860, ch. 37, sec. 23, and it has never been questioned.

See also 18 Ohio, 400, 13 How. 472.
Thomas *vs.* Lawson, 21 How. 340.
Freeman *vs.* Thayer, 33 Maine, 76.
Smith *vs.* Cleveland, 17 Wis., 556.
Hand *vs.* Ballon, 2 Kernan, 541.
Allen *vs.* Armstrong, 16 Iowa, 508. Vt der

It may be said that the record in this case does not show that the land could have been sold in any other way than it was. It does not show that a part might have been sold for sufficient to pay the taxes, or that it was practicable to have sold it. All that is said about it is, that the land is *now* worth twenty dollars per acre, is susceptible of easy division into smaller tracts, and contains one hundred and eighty acres.

This indeed states facts from which such practicability might be inferred; but it should be borne in mind that this is an agreed case, and nothing is to be inferred except what is stated, and the fact is not stated, and it is not established that it would have been practicable to have sold a part of the land in this case. The certificate of sale is at least prima facie evidence of title, and it is for the party seeking to set it aside to *establish* the facts upon which he proposes to succeed.

The Court of Appeals of Virginia base their decision of this case in part upon the reasons given by them in Turner *vs.* Smith, 18 Grat., 830. (See Transcript, page 8.)

These reasons are founded upon the language of the statute in Sec. 7, as amended by the act of Feb. 6, 1863.

By this section the Commissioners in case of default in the payment of the taxes after advertising for four weeks, and giving other notices prescribed, are directed: "At the time and place of sale to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty and costs, and ten per cent. per annum interest on said tax pursuant to said notice; in all cases where the owner of said lots or parcels of ground, shall not on or before the day of sale appear in person before the said Board of Commissioners, and pay the amount of said tax with ten per centum interest thereon, with the cost of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground; the said Commissioners shall be authorized at said sale, to bid off the same for the United States, at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum.

The Court held in Smith *vs.* Turner referred to that the sale was void, because it appeared by the certificate of sale, that the property had sold for less than two-thirds of its assessed value, and, that in such case the Commissioners were *required* to bid it in for the United States, that is, that the words, "shall be authorized," should be construed as mandatory, and not vesting any discretion in the Board.

To this it may be said; first, that even if this were an irregularity, it is not one of the grounds upon which the certificate of sale can be affected as evidence of the regularity and validity of the sale. The language of the statute is, that the certificate of sale, "shall only be affected as evidence of the regularity and validity of sale, by establishing" certain facts therein named of which this is not one.

The statute does not prescribe what the certificate of sale shall contain. It does not prescribe that it shall set forth the proceedings. If it did, every act would have to be recited. Nothing is required except a certificate that the property was sold to the purchaser, and this is certainly "prima facie evidence" of the regularity and validity of said sale, and of the title of the said purchaser under the same.

No particular form is required unless the statute requires it.

Chandler *vs.* Spear, 22 Vermont, 338.

Brown *vs.* Hutchinson, 11 *ibid*, 569.

Blackwell on Tax titles, 435.

The *presumption* is therefore, if such facts were considered necessary that the owner requested the same to be struck off to the purchaser for a less sum than two-thirds, in which case the statute expressly authorizes such sale. The burden of proof would be upon the party assailing the title to show that this was not so. But this he could not do, for it is not one of those facts which he is permitted to establish in order to affect the certificate of sale as evidence of the regularity and validity of the sale.

The Court below say, that the certificate of sale is void upon its face, because it appears from it, that it sold for less than two-thirds of its assessed value. Even if such a fact were permitted to affect the certificate of sale as evidence of title, it is not *in itself* sufficient to show the sale to be irregular. It should further appear affirmatively, (the presumption being in our favor) that the owner did *not* request the land to be struck off at less than two-thirds of its assessed value. Every fact necessary to defeat the title must be shown *affirmatively* by the assailant, the certificate of sale being prima facie, at least, evidence of everything having been done by the Commissioners to make the sale regular and valid.

"Acts done which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter," and facts presumed are as effectually established as facts proved.

Bank of the U. S. *vs.* Dandridge, 12 Wheaton, 70.

Williams *vs.* East India Co., 3 East., R. 192.

Kelley *vs.* Connell, 3 Dana., 532.

Wheelock *vs.* Hall, 3 N. H. R. 310.

In Lessee of Winder *vs.* Stirling, 7 Ohio, 190, the act of the auditor in allowing credit, and making the certificate which could only be done after the delinquent list had been verified by the collector was upheld, because it was presumptive proof that the oath had been administered.

So in this case the act of the Commissioners in selling the land at less than its assessed value must be upheld, because it is presumptive proof that the act "to make it legally operative," the request of the owner (supposing such act were necessary) took place.

The certificate of sale is not therefore void upon its face. It does not even show the irregularity alleged, or show it to be an irregularity, and even if it did, and if it were an irregularity, it is not *such* an irregularity as would be permitted to affect the validity of the sale.

Upon the general principles applicable to tax sales, this alleged irregularity, even if it be such, is not one which would defeat the title of the purchaser. It is not of the slightest consequence to the former owner, whether the land was bid in by the Commissioners or by some other person. "An objection which possesses no intrinsic merit, and *which works no manner of injury to the owner of the estate* ought not to defeat the title of the purchaser." Blackwell on Tax Titles, 311.

Regulations intended merely to promote method, system and uniformity in the mode of proceeding, and which do not effect the rights of tax-paying citizens, may be regarded merely as directory officers, may be legally liable to animadversion, perhaps to punishment for not observing them, yet their observance is not a condition precedent to the validity of their acts.

Terry vs. Milbury, 21 Pick. R. 64.

Spear vs. Ditly, 8 Vermont, 419.

Blackwell, 310, 311.

The statute however, is not to be construed as mandatory or even directory, but simply as permissive or vesting discretion in the commissioners. This may be seen by a careful examination of the statute itself. The first clause quoted, permits a sale to the highest bidder "for a sum not less than the taxes, penalty and costs, and ten per centum per annum interest on said tax." This surely implies a sale for less than two-thirds of the assessed value.

The language of the statute was originally in the act of 1862, "And the said commissioners *shall*, at said sale, strike off the same severally to the United States at that time, unless some person shall bid the same or a larger sum." Mark the difference between this and the amendment of

1863. In the first the word is "shall," in the amendment the words are "shall be authorized."

This change of phraseology plainly shows an intention to change the meaning. The first is clearly mandatory or directory, the last is as clearly permissive. If these words "shall be authorized" were referred to a mind unbiassed and free from impressions made by any technical rules of law or legal authorities, there could be no doubt or hesitation as to their meaning simply to give permission in certain cases. According to the ordinary and popular sense, there could be no difference of opinion. The *onus probandi* therefore, should be upon the parties claiming for them a different meaning to show it. It is contended that the legal and technical meaning of these words is different from the ordinary and popular sense, and that the authorities sustain them in this position.

One of the earliest cases upon this subject is found in the King vs. Inhabitants of Derby. In this case there was an indictment against divers inhabitants for refusing to make a note to pay the constable's tax. Held that the word "may" in the statute was equivalent to "shall."

In 2 Salkeld, 609, upon an indictment upon the same statute, the ground of this decision was more clearly stated. to wit: when the statute directs the doing of a thing *for the public good*, the word "may" should be construed as "shall." This distinction is clearly recognized in all subsequent cases, when the statute directs the performance of an act which is for the benefit of the public or of individuals by the word "may," then the public or individuals have a right ro require it to be done.

See 3 Atkins, 166, 212; 1 Vernon, 153; 2 Chitty, 251.

In 5 Johnson's Ch. 113, it is held that *it must clearly appear* that the interests of third persons or of the public require this construction.

In 9 How. 248, Court say, may means must "if the matter as here is devolved upon a public officer, and relates to the public or third persons. It says further, however, "when the act to be done affects no third persons, and is not clearly beneficial to them or to the public, the words may do not act, or it is lawful to do an act, do not mean must, but rather indicate an intent in the legislature to confer a discretionary power." This case arose upon the following statute: "It shall be lawful for the said corporation, when there shall be a number of lots assessed to the same person or persons, to sell one or more of such lots for the taxes and expenses due on the whole." It was contended that the corporation had power notwithstanding this, to sell the whole in all cases. This was manifestly unjust and shown so to be, by the statute then under consideration.

The language of the statute in 9 Grat. 389, cited in Smith vs. Turner, was, "That the defendant may at any time before final decree, be allowed to file his answer, &c. Held imperative upon the court. This plainly con-

fers a right upon the defendant. It is not that the *Court* may allow, but that the defendant may be allowed. It is plain that in such a case the court has no discretion.

In the Commonwealth vs. city of Pittsburg, cited in 4 Wallace, 435, Justice Grier says, "may means must or shall in cases where the public interest and right are concerned, *and* where the public or third parties have a claim *de jure*, that the powers should be exercised."

In the Mayor vs. city of New York, 3 Hill, cited in 4 Wallace, 426, the charter of the city provided, it shall be lawful for the Mayor, Aldermen, &c., to keep in repair common sewers, drains, &c. An action of trespass on the case against them held to lie for their neglect, because this power was evidently conferred upon them for the public good. This construction was refused in Minor vs. Mechanics Bank of Alexandria. 1 Peters R. 64.

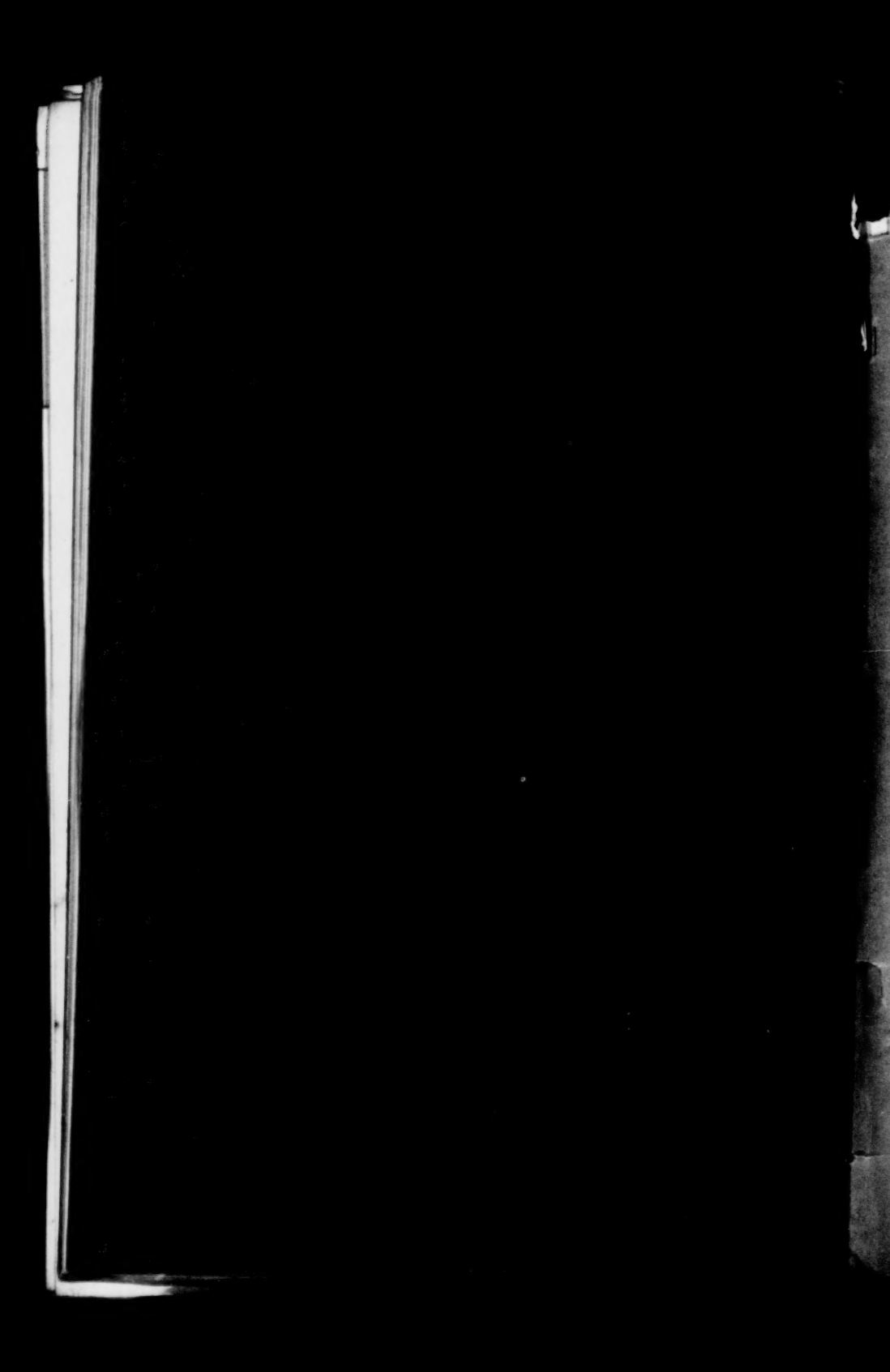
Justice Story in delivering the opinion says: such a construction is proper in all cases where the legislature means to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject further than that, that exposition ought to be adopted in this as in other cases, which carries into effect the true intent and object of the legislature in the enactment. *The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of its provisions.*"

In the Supervisors, &c., vs. the United States, 4 Wall. 435, the language of the statute under consideration was, "The Board of supervisors in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay may, if deemed advisable, levy a special tax," &c. Upon mandamus to compel them to exercise this power, the facts showing that the party was entitled to call for its exercise, the court say after referring to many of these authorities, "Where power is given by statute to public officers in permissive language as that they may, if deemed advisable, do a certain thing, the language used will be regarded as peremptory, where the public interest or individual rights *call for its exercise*."

It will be observed that in this as in all the other cases cited in support of the construction contended for, the public interest or individual rights did most clearly appear, and furthermore, that the public or the individual having such right, called for the exercise of this power in behalf of such right, by mandamus or action for an injury to such interest or right.

Applying these principles to the case at bar, we say:

First: that no right of the defendant in error, is affected in the least by the act of the Commissioners in selling the land for less than two-thirds of its assessed value. *He* therefore has no right to complain. It was not pretended by the court below that this provision was intended for his benefit, or that it could benefit him in any way.



In the Supreme Court of the U. S.

DECEMBER TERM, 1870.

JAMES M. DOWNEY, *Plaintiff in Error*,
vs.
WILLIAM D. NUTT. } No. 268.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

BRIEF OF RICHARD T. MERRICK,

Of Counsel for Defendant in Error.

H. Polkinhorn, Printer, D street, near 7th.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

Brief for the Defendant in Error.

STATEMENT.

In March, 1867, the defendant in error, William D. Nutt, instituted an action of ejectment in the Circuit Court of Alexandria County, in the State of Virginia, on account of the unlawful detainer from him of certain real estate situated in said county, containing 180 acres, and known as "Parm-Will-Allice." The action was brought against one Fletcher, the tenant in possession; but James M. Downey, the plaintiff in error, who claimed the fee was let in to defend the suit.

A case stated was agreed upon; (see Transcript of Record, p. 5,) and upon this case, judgment was given by the Court on the 23d day of November, 1867, in favor of William D. Nutt, the plaintiff in the original suit.

Upon a writ of error sued out by Downey, the judgment of the Court of Alexandria County was affirmed by the

District Court of the Fourth Judicial District of Virginia; and an appeal being taken from the judgment of this latter tribunal, to the Supreme Court of Appeals of Virginia, the judgment was again affirmed. Thereupon the controversy comes up to this Court by writ of error directed to the Court of Appeals of the State of Virginia.

The agreed case shows that William D. Nutt, the defendant in error, was on the 29th day of February, 1864, seized in fee of the tract of land in question; that the said tract was charged in 1860 to said Nutt on the land-books of the State of Virginia, and on said land-books assessed and valued at the sum of $6,300; that, on the said 29th day of February, 1864, the whole tract of 180 acres was sold by the Board of Tax Commissioners appointed by the United States Government for the State of Virginia, on account of arrears of taxes alleged to be due to the United States under the various Acts of Congress hereinafter referred to; that the amount of taxes alleged to be due was $17.01; that there was charged on the land by said commissioners, besides this specific tax, a penalty of fifty per cent, amounting to $8.51, and 15 per cent damages; that, as these taxes and charges were not paid *within sixty days* from the time the amount of said tax was fixed by the Commissioners the land was sold in gross, as stated; that it was bid off to one F. H. Pierpont for $2,400, and was by him assigned to the plaintiff in error, J. M. Downey, who received therefor the certificate of the Commissioners given on page 6 of the Transcript of the Record; that the assessed valuation of property at the time of sale was, as above stated, $6,300; that, at the time of the agreed statemet of facts on which the judgment in the County Court of Alexandria was based, the land was worth $20 an acre; that the tract was easily subdivisible into smaller parcels; that the sale was for less than two-thirds of its assessed value; and that the sale was made without the knowledge

or consent of Nutt, whose title to the land yet remains unchanged, except as it may be affected by the said *tax sale.*

The Acts of Congress, by virtue of which the said sale took place, are three: the Act approved August 5, 1861; the Act approved June 7, 1862; the Act approved February 6, 1871.

The act of August 5, 1861, after the apportionment of the direct tax of $20,000,000 among the various States, of which amount Virginia was required to pay $930,550 66, proceeds to make several miscellaneous provisions for its collection. Section 13 provides that this direct tax "shall be assessed and laid on the value of all lands and lots of ground, with their improvements and dwelling-houses, which several articles subject to taxation shall be enumerated and valued, by the respective assessors, at the rate each of them is valued in money on the 1st day of April, 1862: provided, that, in making such assessment due regard shall be had to any valuation that may have been made under the authority of the State or Territory at any period nearest to said 1st day of April." Section 33 provides "that the annual amount of the taxes so assessed shall be and remain a lien upon all lands and other real estate of the individuals who may be assessed for the same during two years after the time it shall annually become due and payable." Section 35 provides for the collection of "said taxes by distraint and sale of the goods, chattels or effects of the persons delinquent," and for the costs and trouble of such distraint and sale. Section 36 provides that whenever personal property cannot be found sufficient to satisfy the tax the collector shall sell "*so much* of the said property (real estate) *as may be necessary to satisfy the taxes* due thereon, together with an addition of twenty per centum to the said taxes." Where the property is not divisible, the whole may be sold, and the proceeds, after deducting the tax, costs, charges and commissions, shall be held for the owner of the property. After advertisement and be-

fore sale, the owner may prevent a sale by the payment of the tax and an addition of ten per cent.; and he may redeem within two years after sale by repayment of the purchase money with interest at twenty per cent. per annum. Section 52 provides that in the States in rebellion the President shall proceed to collect the tax as soon as the authority of the United States is established therein. The remaining sections of the act are believed to be irrelevant to the issues in this case.

The act of June 7, 1862, has special reference to the collection, in the insurgent States, of the direct tax imposed by the former act.

Section 1 provides that the said tax shall be apportioned and charged in such States "upon all the lands and lots of ground therein," with certain exceptions, "as the said lands and lots of ground were enumerated and valued under the last assessment and valuation thereof made under the authority of said State previous to the 1st day of January, 1861; and every parcel of said lands *is charged with its proportionate share* of the whole tax assessed upon the State; "*and in addition thereto a penalty of fifty per centum of said tax shall be charged thereon.*"

Section 2 requires the President on or before the ensuing 1st of July to declare, by proclamation, in what States or parts of States insurrection exists, and provides that "thereupon said direct tax together with the penalty shall be a lien" upon the lands.

Section 3 allows the owners sixty days wherein to pay the tax and discharge the land of the lien of said tax.

Section 4 provides that in default of payment the title to the lands shall become forfeited to the United States.*

*This Court has decided in *Bennet v. Hunter*, 9 Wallace, that section 4 of the act of 1862 did not, *proprio vigore* forfeit the title, but that the title remained in the owner until sale, and could be divested only by sale.

Section 5 provides for the appointment of a Board of Tax Commissioners for each State.

Section 7 provides that, on default of payment, the Board of Tax Commissioners shall advertise and sell the land "to the highest bidder for a sum not less than the taxes, penalty and costs, and ten per centum per annum interest on said tax;" that they shall strike off the same to the United States at that sum, unless some person shall bid the same or a larger sum;" that the commissioners' certificate of sale "shall be received in all courts and places as *prima-facie* evidence of the regularity and validity of said sale, and of the title of said purchaser or purchasers under the same: *provided*, that the certificate of said commissioners shall only be affected as evidence of the regularity and validity of said sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act." Provisions and conditions of redemption are established.

Sections 9, 10, 11 and 12 direct the manner in which lands struck off to the United States shall be used and disposed of.

The act of February 6, 1863, amends and modifies section 7 of the act of June 7, 1862, so far as to repeal the direction given to the commissioners to purchase the lands for the United States at the amount of the taxes, penalty, cost and ten per cent., and to insert an additional or substituted clause to the effect that "in all cases where the owner of said lots or parcels of ground shall not, on or before the day of sale, appear in person before the said Board of Commissioners and pay the amount of said tax, with ten per centum interest thereon, with the cost of advertising the same, *or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be*

authorized at said sale to bid off the same for the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum."

The defendant in error will maintain that the alleged sale made by the tax-commissioners on the 29th of February, 1864, was null and void, and passed no title to the purchaser or his assignee.

I.

The act of Congress of June 7, 1862, in so far as the same assumes to impose a penalty of *fifty per centum* in addition to the assessed tax, and to make both the penalty and tax, a lien on land in the insurgent States, is unconstitutional.

The act of 1862 relates exclusively to *certain* States.

The Constitution of the United States, art. 1, sec. 3, provides that "direct taxes shall be apportioned among the several States according to their respective numbers."

The acts of August 5, 1861, and of June 7, 1862, are confessedly revenue measures. "They are to be construed together; the general object of both was the same, namely, the raising of revenue." "Under the first act delinquent tax-payers were permitted at any time after advertisement for sale, and before actual sale, to pay the amount assessed with ten per cent. penalty, and thus relieve their lands. The second act imposes on each tract, *without respect to delinquency on the part of the owner*, a penalty of fifty per cent. in addition to its portion of the tax upon the State."

Bennet v. Hunter, 9 Wallace, 326.

If the fifty per cent. called in the act of 1862 a *penalty*, but directed to be imposed "without respect to the delinquency of the owner," and made, together with the tax, a lien upon the land from the date of the assessment of the tax, is a part of the tax, the act of 1862 by the limitation

of its provisions to *certain* States *only* is manifestly in contravention of sec. 3, art. 1, of the Constitution above referred to.

If the fifty per cent. is not a part of the tax, but is in fact, as in name, a *penalty*, resorted to by the Government as a means of collecting the tax, then the act of 1862 is liable to the objection that Congress in carrying into execution the granted power "to lay and collect taxes," can make such laws only as "shall be necessary and proper" for that purpose.

"Let the end be legitimate; let it be within the scope of the Constitution, and all means which are *appropriate*, which are *plainly adapted to that end*, which are *not prohibited* but consist with the letter and spirit of the Constitution are constitutional."

McCulloch v. The State, 4 Wheat., 421.

The means provided by the acts of 1862 and 1863 for *collecting the tax* in certain States, imposed by the act of 1861, are—

1st. An assessment upon the land of a *penalty* of fifty per cent. of the tax in addition thereto at the time of levying the tax, and without reference to the delinquency of the owner.

2d. A sale of the land by summary proceedings to pay the tax and the penalty.

Is a pecuniary penalty imposed under such circumstances, and the sale of the land upon which it is imposed to pay the penalty and the tax, *appropriate* measures for collecting the tax, "plainly adapted to that end," and not prohibited by the Constitution?

If they are not, the act of 1862 is not the law of the land, and the sale in this case could pass no title to the purchaser.

McCulloch v. State of Md., 4 Wheat, 423.
Murray v. Hoboken Land Co., 18 Hd., 274.

The taxing power must be strictly confined within the limits of "State necessity," and cannot be used to enforce a *penalty* or *double* tax in a summary manner.

The State *ex* Relatione, Carter, 1 McMullen, 520.
Blackwell, Tax Titles, 41, 42.

The act of 1861 had determined the extent of the "State necessity" by fixing the amount to be raised by taxation.

An assessment upon the property of a citizen of any sum greater than his proportion of the amount so fixed, is not *taxation.*

To make such assessment without reference to the delinquency of the owner, and before he could possibly be delinquent, and call it a "*penalty*," was to punish before the offense, in anticipation of the possibility that it might be committed.

It is no answer to the argument that the owner might, *under certain circumstances*, relieve the property from both the tax and the penalty by paying the former before the day of sale.

Both the *tax and the penalty* were made a charge upon the land from the date of the levy, and expressly declared to be a *lien* thereon. The land became bound for both, and the owner could not dispose of or mortgage his land, except subject this prior incumbrance. The land was liable to be sold to pay the *penalty* as well as the *tax*, unless the owner should *in person* appear before the commissioners and pay the tax, and was in fact sold to pay both.

The act of 1863 embarrassed the relief given to the owner by the act of 1862, by expressly providing that the tax could be paid only by *such owner in person.*

If the particular penalty imposed by this act is an *appropriate* measure for collecting the tax, what penalty would not be, and where is the limit to the power of Congress over the citizen of the Republic?

It might direct the imposition of a penalty of *five hundred per cent* of the tax as well as of *fifty per cent*, and it would be equally within the power claimed, to direct the tax commissioner, at the time of levying the tax upon a tract of land, to seize the owner and hold him in custody until payment should be made.

In the latter case, by paying the tax, he could release his body from incarceration; in the former, by a like payment he could release his property from the lien of the penalty; but in either case he suffers punishment for delinquency, before being guilty of the offence, and this punishment is imposed upon him *without trial*.

The amount of revenue required from a particular tract of land is the amount of the tax assessed thereon as its due proportion of the entire amount authorized.

In case of delinquency, to sell by summary process, so much of the land as may be necessary to pay the tax assessed upon it, is recognised as within the powers of the government; but to sell it by such summary process to pay any greater sum, or a sum due for any other purpose, is to deprive the citizen of his property without "*due process of law*."

Murray's lessee v. Hoboken Land Co., 18 Hd., 378.

Mr. Justice Johnson, in delivering the opinion of this Court, in the case of the Bank of Columbia and speaking of the words "law of the land," says: "After volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the *arbitrary exercise* of the powers of government, *unrestrained* by the established principles of private right and distribu. tion justice."

Bank of Columbia v. Oakley, 4 Wheat, 244.

The words "law of the land," as used in *magna chartar*, are synonymous in their legal signification with the words "due process of law," used in the Federal Constitution.

Summary process to sell the land taxed to pay the tax, has been long recognised as "due process of law." It is a proceeding founded in necessity, sanctioned by time, and approved and acquiesced in by common consent. But it is believed that no case can be found that sanctions a sale by summary process to pay in *addition* to the tax, a *pecuniary penalty.*

The recognition of such authority in the legislature would subject the citizen to any extent of oppression unrestrained power might think proper to impose, under the *pretense of taxation.*

If the property of the citizen can be sold by summary process to answer a *penalty* imposed for the alleged offence of delinquency without judicial inquiry as to guilt, for what alleged offense may he not be punished in a similar and equally unjudicial and Summary manner?

"The Constitution deals with substance not shadows. Its inhibitions are levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation by legislative enactment under any form however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile provision.

Cummings v. The State of Mo., 4 Wall.

II

The sale was null and void, because, by the 7th section of the act of June, 1862, amended by the act of February 6, 1863, the Board of Tax Commissioners were required to strike off the property to the United States at two-thirds of its assessed value, which was not done.

The assessed value at the time of sale on the land-books of Virginia was $6,300; and this was the assessed valuation to which both the acts of 1861 and 1862 referred, and which by the said acts became an imperative standard for

the commissioners. The amount realised at the sale, $2,300, was much less than two-thirds of that assessed value. It is admitted that Nutt did not request to have the property struck off to any person for that sum of $2,300. It is admitted, further, that the sale was made without the knowledge and consent of Nutt. Under these circumstances, it was the imperative duty of the commissioners, admitting of no discretion on their part, to bid off the property for the United States at two-thirds of the assessment, or $4,200.

But it is contended that the certificate of the commissioners is conclusive as to the regularity and validity of the sale, and that we cannot now go behind it to impeach their action or to demonstrate the illegality of their course. This is an objection that meets us in the very outset, and may as well be answered before proceeding any farther.

1. In sec. 7 of the act of June 7, 1862, it is enacted that the commissioners shall issue to the purchaser "their certificate of sale, which said certificate shall be received in all courts and places as *prima facie* evidence of the regularity and validity of said sale, and of the title of said purchaser or purchasers under the same: *Provided*, That the certificate of said commissioners shall only be affected as evidence of the regularity and validity of sale by establishing the fact that said property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed according to the provisions of this act."

This remains unchanged in the amendatory act of February 6, 1863, and was re-enacted, *without the proviso*, by the joint resolution of February 25, 1867. It is submitted that this last-mentioned resolution virtually repealed the *proviso* contained in the former acts. (See the case of Schenck v.

Peay, in the U. S. Circuit Court for the Eastern District of Arkansas, as reported in the "Internal Revenue Record," Aug. 14th, 1869, vol. x., p. 54.)

But whether the joint resolution of 1869 did or did not repeal this *proviso*, it is submitted that the province of a *proviso* is not to enlarge but to restrict the operation of an act. "It is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided."

Voorhees v. Bank of the U. S., 10 Peters, 449.

"It is intended to restrain the enacting clause, and to except something which would otherwise have been within it."

Wayman v. Southard, 10 Wheaton, 1–30.
1 Scammon, 259.
4 Scammon, 352.
19 Vernon, 129.

It cannot be claimed that the proviso in this instance repeals the enacting clause. The proviso and the enacting clause were both re-enacted in 1863, and Congress then saw nothing contradictory in them. They can readily be construed and stand together. The enacting clause has the effect of shifting the *onus probandi* from the purchaser at the tax sale to the person claiming adversely to him, and thus far modifying the common law mode of proof, which requires the tax purchaser to establish affirmatively the regularity and validity of the sale under which he claims. At common law the tax deed was not even *prima facie* evidence of title; this act of Congress makes it such to a certain extent. The proviso merely limits the scope of the act so far as to declare that the certificate shall be *prima facie* evidence in reference to the three facts therein mentioned. That this is the only reasonable construction is clear from the fact that it is nowhere declared in the act

that the certificate shall be *conclusive* evidence, but merely *prima facie* evidence, which may be rebutted by proof to the contrary.

Many of the States have passed enactments similar to or identical with the acts of Congress in question in regard to the effect of tax deeds as evidence. The language of some of these statutes, as, for instance, that of Arkansas, is much stronger than the language of the acts of Congress. Of the scope and effect of such enactments, this court has more than once expressed its opinion, and other tribunals have given similar decisions.

Billow v. Roberts, 13 Howard, 476.
Thomas v. Lawson and al., 21 Howard, 340.
Merrick & Fenno v. Hutt, 15 Ark., p. 338.

2. It is not within the power of Congress to give to the certificate of the commissioners the effect of conclusive evidence in a judicial proceeding instituted by the owner to impeach the sale.

"In judicial investigations the law of the land requires a trial; and there is no trial if only one party is suffered to produce his evidence. A statute making a tax deed conclusive evidence of complete title, and precluding the original owner from showing its invalidity, would therfore be *void* as not a law regulating evidence, but *an unconstitutional confiscation.*

Cooly on Constitutional Limitations, 368.
Groesbeck v. Seeley, 13 Mich., 329.
Case v. Dean, 16 Mich., 13.
White v. Flynn, 23 Ind., 46.

The right to be governed by existing rules of evidence is not a *vested right;* but in dealing with the subject there

are limits to legislative power which must not be transcended.

By the common law the assessment of a tax must be made in exact compliance with the requirement of the statute authorizing the levy, and the collector in selling the land taxed for default in the payment, must, in all particulars, strictly conform to the provisions of the law from which he derives his authority, otherwise no title passes to the purchaser at the sale.

Street's Excis. v. Course, 4 Cranch, 403.
Thatcher v. Powell, 6 Wheat., 125.
Parker v. Overman, 18 Hd., 137.

The act of Congress, therefore, in assuming to make the certificate of the collector *conclusive* evidence that *every requisite* to pass the title has been complied with, in all cases where anything required by the statute to be done to effect that result has in point of fact been omitted, deprives the citizen of his property *not by due process of law*, but by an arbitrary rule of evidence. In all such cases title has not been divested under the law, for the law has not been complied with, and the title therefore remains in the owner; but the owner cannot assert and maintain his title, because the act of Congress forbids him to prove it in a court of justice. His title remains, but his remedy to enforce it is practically taken away. It is true he is still allowed to bring his suit; but he can't have a trial, for the court is forbidden to hear the evidence of his claim. His property is confiscated by a rule of evidence prescribed by act of Congress. It is submitted that this is not the "due process of law" guarantied by the fifth article of the amendments of the Constitution.

3. These acts of Congress are confessedly revenue acts, and if valid at all are valid only in consequence of the taxing power conferred on Congress by the Constitution.

Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or any department, or officer thereof."—Art. 1, sec. 8. From this provision, if from anywhere, must be deduced the right and power of Congress to give such efficacy to the certificate of the tax commissioners as is prescribed in the seventh section of the act of June 7, 1862.

As already stated, it is not proposed in this case to question the power of Congress to impose these direct taxes to make them a charge upon land, and to enforce their payment by a sale of the land by summary process. But we do question the necessity and propriety, and consequently the validity and constitutionality of any enactment by the Federal Legislature directing, regulating, and limiting the mode of inquiry to be pursued by the citizens in the judicial investigation to which, by the common law and natural justice, he is entitled in contesting the regularity of any summary proceeding by which he has been deprived, or by which it has been sought to deprive him, of his rights of property. The constitutional power is exhausted with the sale of the land and the delivery of the deed or certificate.

As a fair and just exposition of the power of Congress in this regard, and of the scope of the constitutional provision, see Alexander Hamilton's Art, No. 33 of the Federalist.

McCulloch vs. State of Maryland, 4 Wheaton, 423.

4. But even assuming that the certificate of the Tax Commissioners is conclusive evidence and that it can not be impeached except for the matters stated in the proviso, there remains the objection that the certificate is void *on its face.*

The certificate recites that the land was valued on land-books of Virginia, at $6,300, and was struck off at the sale to the plaintiff in error for the sum of $2,400. It is, therefore, void *on its face*, because, according to *its own recitals*, the requirements of the law were not observed in making the sale, and the commissioners therefore in making it, exceeded their authority. It should have been struck off to the United States, which stood there as the highest bidder for the land at two-thirds of its assesed value.

Act of 1862, June 7, Sec. 7.
Moore vs. Brown, 11 Howard, 414.
Turner vs. Smith, 18 Grattan, 830.

It is contended that the commissioners were not required to strike off the property to the United States; that they had discretionary power in the premises.

The words of the act are:—"The said commissioners *shall be authorized* to strike off the same to the United States." That these words leave no discretion to the commissioners, but impose upon them an imparative duty, is abundantly established by reason and authority.

"Whenever it is provided that a corporation or officer "may" act in a certain way, or "*it shall be lawful*" for them to act in a certain way, it may be insisted on as duty for them to act so, if the matter, as here, is devolved on a public officer, and relates to the public or third persons."

Mason vs. Fearson, 9 Howard, 248.
The Mayor of N. York, 3 Hill, 614.
Rex vs. Barber, 2 Salkeld, 609, and numerous other cases cited in Mason vs. Fearson, as above.

In the case of the Supervisors *vs.* The United States, which involved the construction of a statute of Illinois, the words of the statute were:

"The board, &c., *may, if deemed advisable*, levy a special tax, &c., &c."

Mr. Justice Swayne in delivering the opinion of the court says:

"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a poistive and absolute duty.'"

Supervisors vs. The United States, 4 Wallace, 435.

It is not to be presumed that Congress intended to leave it to the discretion of these commissioners to select what lands they should bid in and what lands they should not bid in for the United States. The direction to the commissioners to purchase at the price indicated was intended for the benefit of the Government, and also for the benefit of the owner. Several sections of the act of 1862 contain directions as to the manner in which the lands purchased by the Government should be used and disposed of, and show that the legislature expected the Government to become the owner of these lands to a large extent.

III.

The sale made by the Board of Tax Commissioners in this case was null and void, because the property was capa-

ble of subdivision, and the whole was sold, when the sale of a small portion would have sufficed to pay the whole assessment.

The act of August 5, 1861, sect. 36, provides that, in case of default, the collector "shall proceed to sell at public sale *so much of said property* (land and real estate) *as may be necessary to satisfy the taxes due thereon.*" The act of June 7, 1862, sect. 7, provides that the Board of Tax Commissioners "shall be required, in case the taxes charged upon the said lots and parcels of land shall not be paid, &c., &c., &c., to cause the same to be severally sold to the highest bidder," &c. And these are *all* the provisions respecting the *amount* of property to be sold.

Now, assuming that the latter act so modified the former (which we do not admit, however,) as to authorize a sale of *all* the land, in case of default, it is clear that the power of Congress to provide for the sale of land for the payment of the tax is limited to that object, and a law which requires that the whole land shall be sold in all cases, without regard to the fact that it may be divided without injury to it, and that the tax may be paid by a sale of part of it, is unconstitutional.

Martin vs. Snowden,
Bennet vs. Hunter,
Partner vs. Cazenove,
} 18 Grattan, 100.
McCulloch vs. State of Maryland, 4 Wheaton, 316.

But even upon the assumption that the provisions of the act of 1861 in this particular were repealed and superseded by those of the act of 1862, it is entirely unnecessary to give to this latter a construction so objectionable as the one intimated. The act of 1862 nowhere requires or says that the *whole* of the land must be sold. And it is well settled

that "where the statute is silent as to the quantity which might be sold to pay taxes, a sale of more than is necessary to pay the tax is illegal and void."

Mason v. Fearson, 9 Howard, 248.
Stead's Executors v. Course, 4 Cranch, 403.
Hodge v. Wilson, 12 S. and M. R., 498.
O'Brien v. Coulter, 2 Blackford, 421.
Blackwell on Tax Titles, p. 335–345,
and numerous cases there cited.

The *authority* of the Commissioners extended no farther than to enforce the payment of the taxes, and could not by any legislative enactment be extended farther, without a violation of the constitutional inhibition against the taking of life, liberty, or property, without due process of law. Their authority was to collect the taxes. In selling the *whole* of the property, when the sale of a part would have sufficed for the payment of the taxes, with all reasonable costs and charges, they exceeded their authority, and their action was illegal and void.

Blackwell, chap. xxviii., p. 510, and numerous cases therein cited.

But no such construction of these acts is admissable or proper. The provision in the 36th section of the act of 1861 was not repealed by the act of 1862. These acts are to be construed together. (Bennet v. Hunter, 9 Wallace, 333.) The precise quantity prescribed to be sold by the former act is not changed by the *indefinite* direction of the latter "*to sell the land.*" The act of 1861 is still in force, and the acts of 1862 and 1863 are not in the nature of amendments to that act, and where the latter acts do not by express language or necessary implication repeal a provision of the former act, such provision is still an obligatory law.

IV.

The sale was null and void, because it was made for the non-payment of the tax of $17 01, the penalty of $8 51, *and* 15 *per cent. damages.* There is no warrant whatever in the law for this sum of 15 per cent. damages. No such sum was due upon the land. No such sum was authorized to be levied or collected. And on this point we are entirely free from any difficulties connected with the proviso of the act of June 7, 1862, section 7, in regard to the certificate inasmuch as that proviso, according to the construction of the counsel for the plaintiff in error, allows the certificate to be impeached upon this very ground, *viz*: that no such tax was due.

Corp. of Washington v. Pratt, 8 Wheaton, 681.
Clarke v. Strickland, 2 Curtis C. C., 439.

It is entirely unnecessary to quote authorities to show that a sale for taxes *not due* is wholly null and void.

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